An Application for Reconsideration

- by -

Allan Gordon
("Gordon")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2011A/68

DATE OF DECISION: August 4, 2011

DECISION

SUBMISSIONS

Allan Gordon	on his own behalf
Mary Chan	on behalf of Orca Security Corporation
Sukh Kaila	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an application filed by Mr. Allan Gordon ("Gordon") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal Decision issued on April 29, 2011, under BC EST D039/11 (the "Appeal Decision"). By way of the Appeal Decision, the Tribunal cancelled a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on January 20, 2011. The delegate originally determined that Mr. Gordon's former employer, Orca Security Corporation (the "Employer"), dismissed Mr. Gordon without just cause (see subsection 63(3)(c)) and, accordingly, was obliged to pay him $4,764.79 representing five weeks' wages as compensation for length of service (see section 63), concomitant vacation pay (section 58) and section 88 interest. The Determination also included a further $500 monetary penalty (see section 98) and thus the total amount payable under the Determination was $5,264.79. On appeal to the Tribunal, the Determination was cancelled on the basis that the delegate erred in law in finding that the Employer did not have just cause for dismissing Mr. Gordon. Mr. Gordon now applies to have the Appeal Decision reconsidered.

2. I am adjudicating this application based on the parties' written submissions and have submissions from Mr. Gordon and the Employer. The delegate submitted a very brief letter, dated June 21, 2011, in which he simply stated: "In response to the application for reconsideration filed by Allan Gordon ("Mr. Gordon"), I refer you to the findings contained within the original determination dated January 20, 2011". I have also reviewed all of the submissions and other documents – including the section 112(5) record – that was before the Tribunal Member who issued the Appeal Decision.

3. The Tribunal evaluates reconsideration applications utilizing the two-stage analytical framework set out in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, or is simply an undisguised attempt to re-argue, or have the Tribunal re-weigh, issues of fact that have already been determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.

4. In my opinion, this application passes the first stage of the *Milan Holdings* test inasmuch as it raises an important issue of statutory interpretation and application, namely, whether an employer has just cause for dismissal where the misconduct in question is an epithet directed toward the employer. As is noted in Mr. Gordon's submission, the Tribunal has issued several decisions that are arguably inconsistent with the decision in this case (*i.e.*, cases of swearing at the workplace that did not give the employer just cause for dismissal) and thus there is a need for some clarification.

BACKGROUND FACTS

5. The Employer, among other things, installs home security systems and provides monitoring services. Mr. Gordon was employed for nearly six years with the firm as a "security alarm technician". When his employment ended, in the latter part of March 2010, Mr. Gordon was typically working an 8-hour per day, 5-day per week schedule and was earning $22 per hour.

6. On April 28, 2010, Mr. Gordon filed a complaint under section 74 of the *Act* alleging that the Employer had suspended him for a week and that he was only welcome to return to work if he wrote a "letter of apology…and another letter saying I would improve my attitude". The precipitating event in this matter was an outburst from Mr. Gordon following a meeting between Mr. Gordon and the Employer's principal, Mr. Brad Morrison. In his complaint, Mr. Gordon indicated that during the meeting Mr. Morrison forcefully expressed his dissatisfaction with Mr. Gordon's performance and that when Mr. Gordon left Mr. Morrison's office following the meeting he "muttered asshole in frustration under my breath to on one in particular". Other employees apparently heard something quite different and Mr. Gordon appears to have changed his evidence somewhat – at page R3 of the delegate's "Reasons for the Determination" (the "delegate's reasons") the delegate states: "Mr. Gordon acknowledged he muttered 'fucking asshole' as he was leaving the meeting and passing through the work space." The record includes two witness statements, one from the Employer's former scheduling clerk and another from a currently employed manager. Both statements confirm that Mr. Morrison's door was open during his meeting with Mr. Gordon and that neither heard any yelling or loud voices by either man and that when Mr. Gordon left Mr. Morrison's office they heard him mutter the phrase "fucking asshole", apparently a direct reference to Mr. Morrison. Both reported the incident to the office manager, Ms. Chan, who in turn apparently reported the incident to Mr. Morrison.

7. The record includes a letter dated March 22, 2010, on the Employer's letterhead, signed by Ms. Chan, addressed to Mr. Gordon and headed "WORK SUSPENSION FOR INSUBORDINATION AND FINAL WARNING LETTER". I understand that Ms. Chan and another employee, Mr. Brian Polozzo ("Polozzo"; he appeared on behalf of the Employer at the complaint hearing before the delegate) met with Mr. Gordon on March 22, 2010, at which time Mr. Gordon was advised that his outburst, coupled with prior instances of what the Employer considered misconduct, justified his summary dismissal but that the Employer was prepared to issue a 5-day unpaid suspension instead. However, Mr. Gordon's return to work was subject to several conditions that were set out in the letter including a written letter of apology to Mr. Morrison, another letter promising to "improve your negative attitude and stop incessant complaining" and a requirement that he promise to ensure that his service vehicle (which I understand was also made available to him for his personal use) was cleaned at least monthly. The final paragraph of the March 22 letter reads, in part, "But should you choose not to make observable improvements or refuse to make any corrective behavioral [sic] changes, or write your personal letter of apology to the owner of Orca Security Corp., then it will result in your effective dismissal with cause and immediate termination of employment with cause, since you will be effectively refusing to follow company rules and guidelines." Mr. Gordon signed the letter as "Confirmation that all items listed were understood and reviewed today".

8. Mr. Gordon, in his original complaint form, seemingly corroborated the Employer's version of what transpired at the March 22 meeting. Mr. Gordon stated: "I got a message at 10:45 pm on Sunday March 21, 2010, telling me to come into the office at 9 am instead of 8 am the next morning. When I arrived at the office on Monday morning, I was shown downstairs where Mary Chan informed me that they were initially going to fire me for my comment, but they decided to suspend me for a week instead…She also had me sign a paper stating that I would write a letter of apology to Brad and another letter saying I would improve my attitude if I wanted to come back to work at Orca Security."

9. The record contains evidence that the Employer attempted on several occasions to contact Mr. Gordon regarding his return to work but that Mr. Gordon did not respond. On April 1, 2010, Mr. Gordon sent an e-mail to Ms. Chan stating that he "did not quit" and that "it is against the BC labor code [sic] for an employer to suspend an employee and by doing so, you terminated me". Ms. Chan responded by e-mail the same day setting out the Employer's view that it had the lawful right to suspend Mr. Gordon and that given his failure to respond to the Employer's requests to return to work "you have simply refused to return to work and therefore you have quit on your own accord." I understand that Mr. Gordon took the position that he had been dismissed based on information that had been provided to him during a telephone call with an information officer at the Employment Standards Branch.

The Determination

10. A complaint hearing was scheduled for October 6, 2010, and both Mr. Gordon and Mr. Polozzo testified at that hearing. The delegate issued the Determination and his accompanying reasons 3 ½ months later on January 20, 2011. The delegate summarized the Employer's evidence and argument as follows (at page R2):

> On March 19, 2010, Mr. Gordon was seen in the office of Brad Morrison, owner of Orca, for an incident that occurred on March 15, 2010. The incident was the result of a time discrepancy between Mr. Gordon's timesheet and when he called in the completion of his last job. At the conclusion of the meeting, as Mr. Gordon left the office of Brad Morrison he was heard by two fellow co-workers uttering the words: "fucking asshole" as he walked out.
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> Brad Morrison was informed of this incident and on March 22, 2010, Mr. Gordon's employment was terminated.
>
> In sum, Mr. Pozzolo submitted that the complainant's act of calling Mr. Morrison a "fucking asshole", constituted just cause and was the sole reason for the complainant's dismissal. He therefore takes the position that compensation for length of service is not owed to the complainant. (my underlining)

11. The delegate summarized Mr. Gordon's evidence and argument as follows (page R3):

> Mr. Gordon acknowledged he muttered "fucking asshole" as he was leaving the meeting and passing through the work space. Mr. Gordon claims this language was not directed towards Mr. Morrison [but] rather his frustration with the meeting. Mr. Gordon described the meeting with Brad Morrison as one in which he was yelled at and left feeling threatened. Mr. Gordon argues his mere utterance of an expletive was insufficient to establish just cause. Mr. Gordon claims he is owed compensation for length of service.

12. The delegate determined that Mr. Gordon's expletive did not, of itself, give the Employer just cause for dismissal because:

- "the employer has failed to show what adverse impact, if any, the employee's actions had on the employment relationship" (page R3);
- "the complainant's statement was made outside the direct communication with the owner…[and] the complainant's actions exhibit no direct intent to curse at Brad Morrison as he had ample opportunity to do so during the course of the meeting" (page R.4); and
- "The employer provided no evidence to prove the expletive was directed at the owner Brad Morrison" (page R4).

13. The delegate concluded (at page R4):

> Based on the evidence, I cannot conclude the employment relationship was irreparably damaged by the employee's actions. Nor can I conclude the complainant's use of such language in front of other employees undermined the employer's authority to such an extent that the complainant's immediate dismissal was justifiable. While I do acknowledge the inappropriate nature of this behaviour, I do not find it sufficient to warrant just cause.

14. Accordingly, as noted at the outset of these reasons for decision, the delegate awarded Mr. Gordon five weeks' wages as compensation for length of service (see subsection 63(2)(b)) plus 6% vacation pay and section 88 interest.

The Appeal Decision

15. The Employer appealed the Determination arguing that the delegate erred in law (subsection 112(1)(a)) in concluding that it did not have just cause for dismissal. In addition, and although not specifically identified in its Appeal Form, the Employer raised certain matters that could be fairly construed as allegations that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)). Accordingly, and consistent with a line of authorities commencing with the Tribunal's decision in *Triple S Transmission Inc.*, BC EST # D141/03, the Tribunal Member also addressed these allegations.

16. The Employer's natural justice arguments centered on whether it intended to limit its "just cause" argument solely to the "fucking asshole" comment or, as it asserted, that this incident was a culminating event to a series of alleged instances of inappropriate conduct as demonstrated in documents that it provided prior to the complaint hearing but which were not formally submitted into evidence (at least partly as a result of comments made by the delegate) at the complaint hearing. The Tribunal Member ultimately rejected the "natural justice" ground of appeal (para. 37):

> I find that in this case Orca has made bald and unsubstantiated allegations that it was denied an opportunity by the Delegate to present the other evidence supporting of just cause for terminating Mr. Gordon's employment. I also find that there is no factual basis for Orca's allegation that Mr. Pozzolo was "steered … away" by the delegate from presenting the said evidence. I prefer the evidence of the Delegate that Mr. Pozzolo was explained the adjudication process and given the opportunity to rely upon the other documentary evidence at the Hearing but decided not to take up that opportunity in the face of Mr. Gordon's admission that he used the expletive upon exiting his meeting with Mr. Morrison which Orca relied to terminate his employment on March 22, 2010. While this may have been an unfortunate decision on the part of Mr. Pozzolo, it was an informed decision he made on behalf of Orca. In the circumstances I reject the natural justice ground of appeal of Orca.

17. The alleged error of law concerned whether or not the Employer had just cause for dismissing Mr. Gordon and, in light of the Tribunal Member's conclusions on the natural justice ground, the only issue in dispute was whether Mr. Gordon's outburst constituted just cause for dismissal. The Tribunal Member concluded that it did and that the delegate erred in law in concluding that it did not. Accordingly, the Determination was cancelled. The key portions of the Appeal Decision on this point are reproduced, below (paras. 40 and 42):

> …this is a case of the Delegate acting on a view of facts that, in my view, cannot reasonably be entertained. More specifically, I do not think it matters whether or not the very harsh expletive "fucking asshole" was made by Mr. Gordon "outside of direct communication" with Mr. Morrison. What is important is that it was made at the work place within earshot of other employees who heard it. Further, I fail to see how the Delegate could reasonably conclude that that the expletive was simply "a show of frustration" and not aimed at anyone, particularly Mr. Morrison. Mr. Gordon uttered it upon exiting his meeting with Mr. Morrison which meeting was not a happy one for Mr. Gordon as Mr. Morrison questioned his character and honesty in that meeting. I think the context in which the expletive was

> uttered by Mr. Gordon cannot but only be construed as being directed at Mr. Morrison…
>
> While this may have been a rare and the only occasion when Mr. Gordon may have uttered an expletive directed at his employer in his not so harmonious relationship with his employer, I find that his conduct in this instance was incompatible with the continuation of his employment with Orca. No employer desiring to run a disciplined and respectful workplace could be expected to tolerate such disrespectful outburst by his employee in front of other employees at workplace. I find that Orca has satisfied me that the Determination was based on an error of law and that Orca was justified in terminating Mr. Gordon's employment.

THE APPLICATION FOR RECONSIDERATION

18. Mr. Gordon says that while his outburst may have given the Employer grounds for some sort of disciplinary action ("possibly…a reprimand and apology"), the misconduct in question, standing alone, did not justify his summary dismissal. Mr. Gordon says that the culture in the workplace was such that while profanity may not have been encouraged, it was nonetheless commonplace and effectively condoned. There was nothing in the evidence before the delegate to support this assertion. Mr. Gordon states that his outburst was a partial response to the "rough treatment" he was subjected to by Mr. Morrison but again, the delegate never made a factual finding on that point and, for what it may be worth, the Employer disputes Mr. Gordon's assertion on this score. Mr. Gordon identified several Tribunal and other judicial decisions where isolated instances of swearing in the workplace did not constitute just cause for summary dismissal without compensation or notice.

19. In his submission appended to the Reconsideration Application Form, Mr. Gordon acknowledges that following the outburst in question the Employer told him that he was suspended for one week and that he was invited to return to work on certain conditions (for example, the letter of apology to Mr. Morrison); however, Mr. Gordon later took the position, after speaking with someone at the Employment Standards Branch, that he had been dismissed without just cause.

20. The Employer says that the reconsideration application should be dismissed since the Appeal Decision was "fair and judicious". The Employer also provided some further documentary evidence that was not part of the appeal record and, accordingly, is not properly before me.

21. As noted above, the delegate, in his brief submission, simply referred to his findings set out in his original (and very cursory) reasons. As I read the delegate's reasons, in essence he only made one important finding of fact, namely, that Mr. Gordon, within earshot of other employees, uttered the words "fucking asshole" immediately after leaving a meeting with Mr. Morrison. The delegate *inferred* that this comment was not specifically directed toward Mr. Morrison and *concluded*, as a matter of law, that the comment, standing alone, did not give the Employer just cause for dismissal.

FINDINGS AND ANALYSIS

22. There is no factual dispute regarding the outburst in question. Mr. Gordon concedes that he uttered the phrase "fucking asshole" but apparently still maintains that it was remark uttered in frustration and not specifically directed to Mr. Morrison. The Tribunal Member concluded that this remark could only have been directed at Mr. Morrison and, for my part, I find Mr. Gordon's assertion to the contrary to be extremely disingenuous. The delegate, in determining that Mr. Gordon's remark was not directed toward Mr. Morrison was not making a finding of fact, *per se*, but rather was drawing a factual inference from the proven facts in evidence. Given the fact that Mr. Gordon, immediately prior to the outburst, had left Mr. Morrison's office where, on his own evidence (albeit evidence that was apparently neither accepted nor rejected by the

delegate), he had been harshly criticized for his work performance, it seems reasonable to infer that he had some enmity toward Mr. Morrison. The outburst consisted of an adjective and a noun – in other words, Mr. Gordon was referring to *someone* in a most unflattering fashion. The delegate's conclusion that Mr. Gordon's remark was not directed toward Mr. Morrison was an inference of fact that could not be reasonably entertained and thus I agree with the Appeal Decision that this inference constituted an error of law (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466).

23. The more fundamental issue is whether this outburst gave the Employer just cause for dismissal – the delegate concluded it did not; however, the delegate's determination was overturned by the Appeal Decision. The question of whether an employer has just cause for dismissal is a question of mixed fact and law (see *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 at paras. 48-49). Although *McKinley* concerned a case of alleged dishonesty, the test set out by the Supreme Court of Canada is generally applicable to all forms of employee misconduct (see, for example, *Brazeau v. International Brotherhood of Electrical Workers*, 2004 BCCA 645; *Menagh v. Hamilton (City)*, 2007 ONCA 244). There are two elements to be considered: first, whether the alleged misconduct has been established on a balance of probabilities and second, whether the nature and degree of the misconduct warranted dismissal.

24. In this case, the first branch of the test was unequivocally established – calling your boss a "fucking asshole", at the workplace and in the presence of other employees, is misconduct no matter how far one might wish to stretch the limits of the *Charter*'s free expression guarantee. The second branch of the test is more problematic. In *McKinley* the Supreme Court of Canada espoused the principle of proportionality (at paras. 53 and 57):

> Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed…
>
> …I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

25. As matters now stand, it would appear that isolated instances of swearing do not usually constitute just cause for dismissal. For example, in *Rodrigues v. Shendon Enterprises Ltd.*, 2010 BCSC 941 the employee's alleged misconduct included incidents of swearing but the court concluded that swearing, even coupled with other acts of minor misconduct, did not give the employer just cause for dismissal. Mr. Justice Butler observed (at para. 35):

> Much of the conduct referred to in the probation letter had been permitted at the Dairy Queen for a long time, or was relatively trivial in nature. An example of conduct that had been permitted for some time was Ms. Rodrigues' swearing. It was apparent at trial that all employees used foul language. While Ms. Rodrigues may have done so more than others, when employees have not been told that such behaviour is inappropriate, it is disingenuous to use that behaviour as a basis to justify summary dismissal.

26. On the other hand, swearing at your boss is quite another matter as it couples inappropriate workplace behaviour with a form of insubordination. In *Marc Fortier v. Kal Tire*, 2006 BCPC 223, an employee with 21 months' service and who apparently had "anger management issues" about which he had been cautioned some six months prior to his dismissal, launched a profanity-filled tirade against his boss when given notice of a corporate reorganization that he believed would adversely affect him. Judge Hogan found that there was just cause for dismissal:

> My view of the facts is that Marc Fortier did lose control of his temper on January 21, 2004 and that the anger, foul language and disrespectful statements directed towards Glendon MacDonald and Kal Tire were sufficient to sever the employer/employee relationship. He underestimates his own actions. Glendon MacDonald was certainly stunned by the verbal attack. It is clear from the two other members of the support line staff that were called that they knew Marc Fortier had gone too far, and he was going to be fired. Whether he called his manager a "fucking asshole" or merely indicated that the support line staff were being treated like "fucking assholes" does not matter much. Although a certain amount of profane language was not unknown at the work place, indeed swearing is not uncommon in society, it was Marc Fortier's vigorous use of the "f-bomb", his tone, his red face, his physical aggressiveness, his belittling of his manager and other management in front of other employees that gave his employer just cause for immediate termination.

27. The Tribunal has addressed the matter of cursing one's boss in a few decisions. In *Sentinel Peak Holdings Ltd.*, BC EST # D359/98, a bar waitress took an unauthorized break and when her manager asked to return to her work station, she did so but refused to do any work. She subsequently left her station a second time and when her manager spoke to her she "'exploded"' and started screaming obscenities ('who the fuck do you think you are' and 'do not tell me what the fuck to do') in front of the staff and customers." (page 3). A couple of hours later, at the end of her shift, her manager asked her if she wished to discuss the matter, but the employee "told him where to go" and left the premises. Former Tribunal Vice-Chair Edelman upheld the dismissal (at page 8):

> Mortimer's evidence establishes that Mrus' [the employee] conduct on September 8, l997 constituted an act of misconduct sufficiently serious to justify summary dismissal. I conclude that Mrus's actions constituted a willful and deliberate flouting of the essential conditions of her employment contract and she conducted herself in a manner that was inconsistent with the continuation of her employment. Accordingly, she is not entitled to compensation for length of service.

28. In *Below the Belt Store (Victoria) Ltd.*, BC EST # D132/00, the employee told his acting manager, within earshot of some store customers, "fuck you; just fuck off" and then abandoned his shift on a very busy day. The Tribunal concluded that the employer did have just cause for dismissal (at page 5):

> Where an employee uses profanities and directly challenges the authority of his manager in the presence of other employees and customers such conduct is inconsistent with his continued employment - see *Re: Sentinel Peak Holdings Ltd.* BC EST # D359/98. In this case Chatlain [the employee] not only challenged his manager but abandoned his position saying "I'm out of here!" While a single incident of abandoning a position has been found not to warrant dismissal, *Re: Million Fancy Investments Co.* BC EST # D342/97, in this case the abandonment on top of the abusive behaviour toward the manager amounts to just cause for dismissal.

29. The facts of this case are somewhat similar to those in *Justason*, BC EST # D109/97, where the employee, dissatisfied with an explanation given to him about the processing of his MSP premiums, walked out of an office and within earshot of several employees referred to the business owner as a "fucking asshole" and stated that he "hated that prick". He also "knocked the office door off its hinges and kicked several empty cardboard boxes around the shop". In concluding that there was just cause for dismissal, former Tribunal Chair Crampton stated (page 7):

> Justason's actions and words amounted to a fundamental breach and repudiation of the employment relationship. He offered no rationale as to why he did not accept the explanations offered to him by both Mrs. Thomas and the [MSP] accounting clerk concerning the delay in posting payments to his account. He expressed no remorse nor offered any apology for his profanities.

> On balance, I find it improbable that Thomas provoked an emotional reaction by Justason on September 17th. I also find that Justason's words and actions were both insolent and insubordinate to such a degree as to repudiate the employment relationship. In short, Justason's words and actions were sufficiently serious to justify his dismissal without warning.

30. The fundamental question before the Tribunal on appeal was whether Mr. Gordon's conduct justified summary dismissal. I have no doubt, and Mr. Gordon even concedes, that his misconduct justified some sort of disciplinary action. In *McKinley*, the Supreme Court of Canada noted (at para. 52):

> This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee's pay for any loss incurred by a minor misuse of company property. This is one of several disciplinary measures an employer may take in these circumstances.

31. However, at least in British Columbia, "docking" an employee's *earned* pay would certainly run afoul of the *Act* (see section 21). An unpaid suspension, of appropriate duration, may not run afoul of the *Act* provided it did not amount to a "constructive dismissal" under section 66. Unlike arbitrators under the *Labour Relations Code*, this Tribunal does not have the power to determine that "a dismissal…is excessive in all circumstances of the case and substitute other measures that appear just and equitable" (*Labour Relations Code*, section 89(d)). Thus, the delegate framed the issue before him as whether or not the Employer had just cause for *dismissal* (rather than just cause for *discipline*).

32. However, in the case at hand, the Employer did *not* immediately *terminate* Mr. Gordon. For some reason, this uncontested fact appears to have been ignored throughout these proceedings to date. The Employer's March 22, 2010, letter (referred to earlier in these reasons) seems clear – Mr. Gordon was issued a 5-day unpaid *suspension* (note, this was not a "docking" of earned wages). He was invited to return to work provided, among other things, he wrote a letter of apology to Mr. Morrison. Without commenting on the propriety of the other conditions imposed, I would simply state that this requirement hardly seems inappropriate given Mr. Gordon's conduct. Mr. Gordon refused to provide an apology and took the position that he had been terminated. It seems to me that the appropriate issue to be addressed by the delegate was whether Mr. Gordon voluntarily quit his position or whether the Employer's response to his misconduct constituted a contravention of section 66. Alternatively, and only if it were determined that the Employer effectively dismissed Mr. Gordon under section 66, the Employer could then have argued it had just cause for the dismissal. As things transpired (and perhaps because of the position taken by the Employer at the complaint hearing – as opposed to the position it took in its submissions filed in advance of that hearing), the delegate simply by-passed the first inquiry and turned his mind to the second.

33. As matters now stand, the Appeal Decision held that the Employer had just cause for dismissal. Mr. Gordon, on reconsideration, says that the Appeal Decision is wrong in law. As for the first branch of the *McKinley* test, I am satisfied that misconduct on the part of Mr. Gordon was proven. As for the second branch of the test, I note that this was not a simple case of "swearing" in the workplace. Rather, the statement uttered was specifically targeted toward Mr. Morrison, the owner of the business, and was heard by other employees. Mr. Gordon was suspended for his misconduct and invited to return to work provided, among other things, he provided a letter of apology. Mr. Gordon, so far as I can determine, never verbally apologized for his behaviour and he also refused to submit a letter of apology thus effectively abandoning his employment.

34. Since the question of whether there was a voluntary quit or a section 66 deemed termination was never addressed at any stage of these proceedings (although it perhaps should have been), the only remaining question was whether the Employer had just cause. This question, in turn, requires an examination of whether dismissal was a justifiable sanction for the misconduct in question. Previous Tribunal and judicial

decisions have effectively drawn a bright line between general bad language in the workplace and the form of insubordination that is encapsulated in calling your boss a "fucking asshole". While the former type of misconduct may not generally give the employer just cause for dismissal, the latter type of conduct invariably does particularly where, as here, this misconduct is coupled with an abandonment of employment (recall that Mr. Gordon was welcome to return to work once he satisfied certain conditions, none of which he ever challenged as being unlawful) and a refusal to apologize.

35. In sum, I am not persuaded that the Appeal Decision reflects a clearly incorrect interpretation or application of the "just cause" principle in the circumstances of this case.

ORDER

36. Pursuant to section 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal